

Appl. No. 10/725,251  
Docket No. P146  
Amdt. dated January 11, 2011  
Reply to Office Action mailed on October 13, 2010  
Customer No. 27752

## REMARKS

### Claim Status

Claims 1-3 and 6-20 were pending in the present application.

Claims 9-20 were previously withdrawn as a result of an earlier restriction requirement.

With this Response, independent claim 1 has been amended. Support for this amendment can be found on page 4, lines 1-11 of the specification as filed. Claim 2 has been canceled. It is believed these changes do not involve any introduction of new matter. Consequently, entry of these changes is believed to be in order and is respectfully requested.

### Rejection Under 35 U.S.C. § 103(a) Over Baillon et al. (U.S. 2003/0195166)

Claims 1, 3 and 6-8 have been rejected under 35 U.S.C. § 103 as being unpatentable over Baillon et al. (U.S. 2003/0195166). Applicants respectfully traverse this rejection to the extent it applies to the newly amended claims.

In order for a case of obviousness to be established, three criteria must be met. First, there must be some suggestion or motivation, i.e. desirability, either in the references themselves, or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art references must teach or suggest all of the claim limitations. See MPEP 2143. Applicants respectfully submit that a case of obviousness does not exist because the references, even when combined, do not teach or suggest all of the claim limitations of amended independent claim 1 and its dependent claims.

As now amended, independent claim 1, and by extension the dependent claims therefrom, recite, inter alia, that the added short chain oligofructose comprises 1-kestose, nystose, and 1F-beta-fructofuranosylnystose, of, such that the short chain oligofructose comprises from about 30% to about 40% 1-kestose, from about 50% to about 60% nystose, and from about 5% to about 15% 1F-beta-fructofuranosylnystose, by weight of the short chain oligofructose. As best understood by Applicants, Baillon fails to disclose

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this specific short chain oligofructose. Baillon simply discloses oligofructose and varieties of FOS (see paragraph 0015) but fails to disclose, teach, or suggest the specific short chain oligofructose as is now presently claimed. Thus, for at least this reason, Baillon fails to disclose each and every element of the claims, and Applicants respectfully request reconsideration and withdrawal of the rejection since a proper case of obviousness cannot stand without the present of each and every element of the pending claims.

Rejection Under 35 U.S.C. § 103(a) Over Baillon et al.

(U.S. 2003/0195166) in view of Flickinger et al.

Claims 1-3 and 6-8 have been rejected under 35 U.S.C. § 103 as being unpatentable over Baillon et al. (U.S. 2003/0195166) in view of Flickinger et al. Applicants respectfully traverse this rejection to the extent it applies to the newly amended claims.

In order for a case of obviousness to be established, three criteria must be met. First, there must be some suggestion or motivation, i.e. desirability, either in the references themselves, or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art references must teach or suggest all of the claim limitations. See MPEP 2143. Applicants respectfully submit that a case of obviousness does not exist because the references, even when combined, do not teach or suggest all of the claim limitations of amended independent claim 1 and its dependent claims.

As now amended, independent claim 1, and by extension the dependent claims therefrom, recite, inter alia, that the added short chain oligofructose comprises 1-kestose, nystose, and 1F-beta-fructofuranosylnystose, of, such that the short chain oligofructose comprises from about 30% to about 40% 1-kestose, from about 50% to about 60% nystose, and from about 5% to about 15% 1F-beta-fructofuranosylnystose, by weight of the short chain oligofructose.

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The Office Action attempts to remedy the deficiency of Baillon, as described above, by looking to Flickinger. However, such reliance is misplaced for the following reasons.

The Office Action points to page 2010, right column, paragraph 4, of Flickinger. Critically, Applicants point out that for this experiment of Flickinger, the scFOS was administered orally by gelatin capsule and not in a nutritionally balanced dog or cat food, which is presently claimed. See third full paragraph, right column, page 2010. Additionally, Flickinger states that this administration orally by gelatin capsule was done in order to avoid the possibility of scFOS degradation during diet processing. Accordingly, Flickinger very explicitly teaches away from using scFOS in its form for use in a diet, which one of ordinary skill in the art would understand to be a nutritionally balanced dog or cat food.

Thus, Applicants submit that a case of obviousness cannot stand based on such a teaching away. MPEP 2141.02 VI. states that a prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984). MPEP 2145 X. D. states that a prior art reference that "teaches away" from the claimed invention is a significant factor to be considered in determining obviousness. Moreover, per MPEP 2145 X. D. 2., references cannot be combined where reference teaches away from their combination. Additionally, the MPEP, in 2145 X. D. 3., states that the totality of the prior art must be considered, and proceeding contrary to accepted wisdom in the art is evidence of nonobviousness.

Here, Flickinger clearly and explicitly teaches that its administration orally by gelatin capsule was done in order to avoid the possibility of scFOS degradation during diet processing. Accordingly, Flickinger very explicitly teaches away from using scFOS in its form for use in a diet, which one of ordinary skill in the art would understand to be a nutritionally balanced dog or cat food. Thus, per MPEP 2145, these references cannot be combined. Thus, Applicants submit that the proposed combination with Baillon cannot stand and that the rejection in view of the currently amended claims should be withdrawn.

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Therefore, Applicants respectfully request reconsideration and withdrawal of the rejection since a proper case of obviousness cannot stand based on Baillon in view of Flickinger.

#### CONCLUSION

This Response represents an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the applied references. In view of the foregoing, entry of the amendments presented herein, reconsideration of this application, and allowance of the pending claims are respectfully requested.

Respectfully submitted,

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